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6 **UNITED STATES DISTRICT COURT**  
7 **WESTERN DISTRICT OF WASHINGTON**  
8 **AT SEATTLE**

9 **UNITED STATES OF AMERICA,**

10 Plaintiff,

11 v.

12 **IMPULSE MEDIA GROUP, INC.,**

13 a Washington corporation,

14 Defendant.

**No. CV05-1285L**

**PLAINTIFF'S MOTION FOR  
PERMANENT INJUNCTION**

NOTING DATE: April 11, 2008

15 The government hereby moves this Court to impose injunctive relief against defendant  
16 Impulse Media Group, Inc. ("IMG").

17 **I. Legal Standard for Injunctive Relief**

18 This Court stated the standard for injunctive relief:

19 A party can subject itself to injunctive relief whenever it intentionally pays for, or  
20 induces, a third-party to send any commercial e-mail message. Once a party  
21 intentionally pays for, or induces, a commercial email to be sent, it cannot escape  
22 liability for injunctive relief simply because it was unaware that CAN-SPAM  
provisions were being violated by the party sending the e-mails. In that sense,  
plaintiff is correct in its statement that CAN-SPAM's injunctive relief provisions  
contain "no exception for renegade behavior."

23 Order Denying Motions for Summary Judgment at 5:18-24 ("Order") [Docket Entry 38].

24 **II. Evidence of IMG's Intentional Inducement to Affiliates Send Emails**

25 Seth Schermerhorn testified that he instructed IMG graphic designer Josh Mackey to  
26 create promotional material for use in email promotion by affiliates. He testified that he supplied  
27 this material to PureCash. As detailed below, IMG affiliate PureCash is closely aligned to IMG

1 affiliate imatrix. Imatrix sent five of the violative emails containing the promotional material  
2 that IMG created and provided specifically for use in emails. (Trial Exhibits 13-17).

3 **A. Messrs. Schermerhorn and Mackey Testified that IMG Created and**  
4 **Provided Promotional Material for Use in Emails**

5 Mr. Schermerhorn testified that IMG created marketing material for use in emails by  
6 affiliates to promote IMG, he knew the marketing material would be used in emails, and IMG  
7 would pay the affiliate if IMG got subscribers from opt-in emails. Trial Testimony (“TT”) at  
8 36:9-37:4 (Ex. 1); 103:1-15 (Ex. 2). He testified this was not prohibited by IMG’s Program  
9 Agreement. TT at 48:17-24 (Ex. 2). Mr. Schermerhorn also testified that he instructed Mr.  
10 Mackey to create ad materials to supply to “Luke” at “PureCash,” and that he, Mr.  
11 Schermerhorn, supplied these materials to PureCash. TT at 4:16-6:2 (Ex. 1). Mr. Schermerhorn  
12 testified that he intended the promotional material to be used in opt-in emails. Id.; TT at 36:9-  
13 37:4 (Ex. 1). Mr. Mackey specifically identified the jizzlickers ad in trial exhibit 13 as material  
14 he designed at the request of Mr. Schermerhorn. Mackey Depo. at 25:3-18 and 96:14-21 (Ex.  
15 3).<sup>1</sup>

16 Importantly, Mr. Schermerhorn testified that the promotional material was for use in  
17 emails by affiliates to promote IMG. TT at 36:14-15 (Ex. 1); 103:6-8 (Ex. 2). His testimony  
18 expressly demonstrates that *multiple affiliates* were permitted to email. Id. The provision of the  
19 marketing material as well as the promise to pay are the intentional inducements provided by  
20 IMG to third parties, such as PureCash, to send email to promote IMG’s web sites.

21 **B. PureCash and Imatrix Are Closely Connected to One Another**

22 Both PureCash and imatrix are IMG affiliates. Tr. Ex. 416 (PureCash, pp. 301-03, line  
23 5121; imatrix, pp 139-141, line 2375) (Ex. 4). Luke McCoy signed up PureCash to be an IMG  
24 affiliate and provided that payment be sent to Pure Marketing Solutions. (Id.).<sup>2</sup> Both PureCash  
25 and imatrix provided the same phone number during the affiliate sign up process. Tr. Ex. 416

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26 <sup>1</sup> At trial, IMG stipulated that Deposition Exhibit 24 was Trial Exhibit 13.

27 <sup>2</sup> Mr. Schermerhorn refers to “Luke” of “PureCash” in his testimony. TT at 5:6-13 (Ex. 1).

1 (PureCash, p. 301, line 5121, col. M; imatrix p. 139, l. 2375, col. M) (Ex. 4). The street address,  
2 suite, city and state provided for I-Matrix Tech in trial exhibits 13-17 ("3959 Van Dyke Rd. Ste  
3 246, Lutz, FL.") is the same as the street address, suite, city and state provided by affiliate  
4 PureCash during the sign up process. (Tr. Ex. 416, p. 301, l. 5121) (Ex. 4).

5 Mr. Schermerhorn testified that Internet Matrix Technologies "settled with the FTC or  
6 DOJ for sending, I believe, unsolicited email for promoting a couple of different affiliate adult  
7 programs." TT at 55:9-22 (Ex. 2). In fact, PureCash a/k/a Pure Marketing Solutions, LLC, and  
8 Internet Matrix Technology, Inc., together entered a Stipulated Judgment For Civil Penalties and  
9 Permanent Injunctive Relief with the government to resolve allegations of violating CAN-  
10 SPAM. (Ex. 5).<sup>3</sup> The Stipulated Judgment was signed by Michael H. Gardner on behalf of both  
11 Pure Marketing Solutions and Internet Matrix Technology. (Ex. 5 at p. 20). Pure Marketing  
12 Solutions, a/k/a PureCash, and Internet Matrix Technology, a/k/a imatrix, are closely linked.  
13 The evidence demonstrates that the promotional material created by Mr. Mackey and supplied by  
14 Mr. Schermerhorn to Luke of PureCash for use in email promotion was used in violative emails  
15 by imatrix promoting IMG's web site jizzlickers.<sup>4</sup>

16 **C. Imatrix Sent Emails that Violated CAN-SPAM**

17 Trial Exhibits 13-17 were admitted into evidence without objection. Each email contains  
18 the marketing material designed by Mr. Mackey. See Mackey Depo. at 96:14-21 (Ex. 3) (the  
19 jizzlickers material is identical in each email). Each email was received by a Microsoft trap  
20 account and each email fails to contain the equivalent of the brown paper wrapper.<sup>5</sup> Each email

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21 <sup>3</sup> The government requests that this Court take judicial notice of the Stipulated Judgement for Civil  
22 Penalties and Permanent Injunctive Relief entered by the United States District Court for the Middle District of  
23 Florida.

24 <sup>4</sup> Tr. Ex. 416 indicates that both PureCash and imatrix are "active" affiliates at the time of discovery. Tr.  
25 Ex. 417 indicates that PureCash received payments from IMG in 2004.

26 <sup>5</sup> The "stars" used by IMG to cover aspects of the sexually-oriented material fail to render the sexually-  
oriented material as compliant with CAN-SPAM. Even if one agrees that the "stars" are sufficient, the emails still  
lack the use of the term "Sexually Explicit: " in the subject line and initially viewable content of the emails.

1 contains the exact same hyperlink (including subdomain), which when clicked upon, leads to  
2 IMG's jizzlickers.com. Tr. Ex. 455 (web capture admitted into evidence without objection).

3 **D. IMG Admitted its Affiliates Used Email to Promote IMG's Websites**

4 In its closing, IMG admitted that some of its affiliates used email to promote IMG's  
5 websites. "Yes, Impulse Media Group provides opportunities at times for people to send  
6 solicited e-mails." TT at 3:11-12 (Ex. 6). This is consistent with the trial testimony of Messrs.  
7 Schermerhorn and Mackey as well as the admitted fact that "[e]mail and electronic newsletter  
8 marketing are examples of a type of marketing Defendant affiliates may choose to use."  
9 Admitted Fact #17. IMG sought to distinguish between solicited and unsolicited email. But this  
10 distinction is irrelevant to the determination of injunctive relief. Under this Court's Summary  
11 Judgment Order, once a party intentionally induced a commercial email to be sent, it cannot  
12 escape liability for injunctive relief simply because it was unaware that CAN-SPAM provisions  
13 were being violated by the party sending the emails. As this Court held: "a party who  
14 intentionally induces another to send commercial e-mails, but who is unaware that the other  
15 party is violating the Act's provisions could be subject to injunctive relief[.]" Order at 7:3-5.

16 **III. Jury Instructions and Jury's Verdict**

17 Following the close of the evidence, the government requested a jury instruction based  
18 on this Court's summary judgment decision that once a party intentionally induced a commercial  
19 email to be sent, it cannot escape liability for injunctive relief simply because it was unaware  
20 that CAN-SPAM provisions were being violated by the party sending the e-mails. TT at 8:24-  
21 10:11 (Ex. 7). The Court denied the government's request, holding that the additional  
22 instruction might confuse the jury, as it was the jury's task was to determine whether IMG was  
23 liable for civil penalties. Id. at 14-15. Importantly, this Court held that it would do the fact  
24 finding and decide the issue of injunctive relief itself. Id. ("I am just going to take the injunctive  
25 thing back and decide it myself . . . I will do the fact finding on that myself."). While the jury  
26 found that IMG did not initiate the transmission of emails that violated CAN-SPAM as set forth  
in Instructions 10-12, this finding was in the context of determining the issue of a civil penalty,

1 not injunctive relief.<sup>6</sup> The jury was not informed of the legal standard for injunctive relief.  
2 However, based on the evidence, IMG did intentionally induce some of its affiliates to send  
3 email. Given this fact and this Court’s prior ruling on the standard for injunctive relief, it  
4 follows that this Court should impose injunctive relief.

5 **IV. Proposed Injunctive Relief**

6 Paragraphs I and II of the proposed relief would prohibit IMG and its Representatives  
7 from violating CAN-SPAM and the Adult Labeling Rule, respectively. (Ex. 8). Paragraph III  
8 requires IMG and its Representatives to implement safeguards to verify and monitor its affiliates.  
9 Paragraph IV permits standard methods of investigating potential order violations. Paragraph V  
10 requires IMG to provide a written report to the FTC setting forth the manner in which it has  
11 complied and is complying with the order. The injunctive relief is designed to prevent IMG  
12 from engaging in illegal practices in the future. As the Supreme Court has observed with respect  
13 to FTC orders:

14 Orders of the Federal Trade Commission are . . . to prevent illegal practices in the  
15 future. . . . If the Commission is to attain the objectives Congress envisioned, it  
16 cannot be required to confine its road block to the narrow lane the transgressor  
17 has traveled; it must be allowed effectively to close all roads to the prohibited  
18 goal, so that its order may not be by-passed with impunity.

19 *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The Ninth Circuit recognizes that FTC orders  
20 should “‘fence in’ known violators of the Act” and that “[f]encing-in provisions serve to ‘close  
21 all roads to the prohibited goal, so that [the FTC’s] order may not be by-passed with impunity.’”  
22 *Sterling Drug, Inc. v. F.T.C.*, 741 F.2d 1146, 1154 (9th Cir. 1984) (citations omitted).

23 **V. Conclusion**

24 IMG subjected itself to injunctive relief when it intentionally induced affiliate PureCash  
25 *and others* to send commercial e-mail. Once IMG intentionally induced commercial emails to be  
26 sent by PureCash, IMG cannot escape liability for injunctive relief even if it was unaware that  
27 CAN-SPAM was being violated by PureCash’s closely aligned ally, imatrix.

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28 <sup>6</sup> IMG argued that the government needed to prove that IMG intentionally induced affiliates to send  
*unsolicited email*. TT at 3:13-15; 4:5-8 (Ex. 6). This is very different than the proof necessary for injunctive relief.

1 DATED: April 4, 2008

Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 4, 2008, I electronically filed the foregoing with the Clerk  
3 of the Court using the CM/ECF System which will send notification of such to the following  
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